

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RAMIRO GALICIA,

Petitioner,

vs.

RENEE BAKER, et al.,

Respondents.

Case No. 3:11-CV-00017-RCJ-(VPC)

ORDER

Before the court are the first amended petition for writ of habeas corpus (#12), respondents' motion to dismiss (#21), petitioner's opposition (#23), and respondents' reply (#24). The court finds that one ground for relief does not state a claim, and the court grants the motion in part.

Pursuant to a plea agreement, petitioner was convicted of first-degree murder in violation of an extended order for protection against domestic violence. The state district court sentenced petitioner to life imprisonment without the possibility of parole for the murder, and the court sentenced petitioner to consecutive two to five years' imprisonment for the protective-order violation. Ex. 15 (#13). Petitioner did not appeal the judgment of conviction.

Petitioner then commenced post-conviction proceedings in state court. He filed a proper-person habeas corpus petition. Ex. 23 (#13). The state district court appointed Matthew D. Ence to represent petitioner, and counsel filed a supplement to the petition. Ex. 30 (#13). The state district court conducted an evidentiary hearing. Ex. 33 (#14). The state district court then denied the petition. Ex. 35 (#14). Petitioner appealed. The state public defender was appointed to represent petitioner on appeal. Ex. 37 (#14). The Nevada Supreme Court affirmed. Ex. 44 (#14).

1 Petitioner then commenced this action. The court appointed counsel, who filed the first
2 amended petition (#12). The motion to dismiss (#21) followed.

3 Respondents first argue that petitioner has not exhausted his state-court remedies for federal
4 amended grounds 2 and 4. Before a federal court may consider a petition for a writ of habeas
5 corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To
6 exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court,
7 describing the operative facts and legal theory, and give that court the opportunity to address and
8 resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v.
9 Harless, 459 U.S. 4, 6 (1982).

10 In federal amended ground 2, petitioner claims that his attorney provided ineffective
11 assistance because the attorney failed to advise petitioner of his right to appeal. In federal amended
12 ground 4 petitioner claims that his attorney provided ineffective assistance because the attorney
13 failed to adequately investigate and prepare a defense for petitioner. Such defenses included heat of
14 passion and mental illness.

15 Petitioner raised the same claims as grounds 1 and 3 of his state habeas corpus petition. Ex.
16 23 (#13). He restated the grounds in his supplement. Ex. 30, at 5 (#13). At the evidentiary hearing
17 Ence, petitioner's attorney, effectively dropped the grounds:

18 "Your Honor, I believe that Petitioner does not wish to challenge the legality of his sentence
19 or any portion of the sentence, either, at this stage. At this stage he's simply interested in
20 being able to withdraw the plea, and that is the entirety of the appeal that he wishes to pursue
right now."

21 Ex. 33, at 52 (#14). On appeal from the denial of that petition the state public defender, now
22 representing petitioner, attempted to revive the grounds. First, petitioner argued:

23 "Despite his reliance on interpreters, review of the overall record of the evidentiary itself
24 makes it clear that Mr. Galicia has and had no clear understanding of his situation, the
circumstances or procedures, or what his guilty plea involved.

25 "In addition, although he indicated that he would waive the claim, the same argument is
26 made for his loss of his direct appeal."

27 Ex. 39, at 1 (#14). Later, petitioner argued:
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1 “The record reflects that Mr. Galicia expressed numerous times to his counsel that he had
2 not planned to kill Jasmine, that he had only wanted to talk to her, that he felt there were
3 extenuating circumstances that could help explain his actions that might be relevant to a
4 jury. And although his attorney may have felt that Mr. Galicia’s proposed arguments in
5 defense and mitigation were not advisable, the final decision on whether or not to go to trial
6 rests solely with the defendant.”

7 Id., at 7-8. In its decision, the Nevada Supreme Court held:

8 Galicia also makes cursory arguments raising claims that he abandoned in the district court.
9 We need not consider those, but nevertheless conclude they are without merit: (1) his appeal
10 deprivation claim because it is without support in the record; and (2) his claim that trial
11 counsel ineffectively assisted him in entering his plea because he fails to prove or allege
12 prejudice such that there is a reasonable probability that, but for counsel’s errors, Galicia
13 would not have pleaded guilty and would have insisted on going to trial.

14 Ex. 44, at 2 n.1 (citations omitted) (#14).

15 Respondents unpersuasively argue that the direct-appeal claim that the Nevada Supreme
16 Court mentions is not the same claim of ineffective assistance of counsel presented in federal
17 amended grounds. Both post-conviction appellate counsel and the Nevada Supreme Court
18 mentioned a claim about the loss of a direct appeal. However, petitioner never presented in his state
19 habeas corpus petition a free-standing claim that he was deprived of his direct appeal. The claim
20 always was that counsel provided ineffective assistance because counsel did not advise petitioner
21 about a direct appeal. See Ex. 23, at ground 1 (#13). When both post-conviction appellate counsel
22 and the Nevada Supreme Court mentioned the claim about the loss of a direct appeal, they could
23 only have been referring to the claim of ineffective assistance of counsel. Any other conclusion
24 would require the court to assume that both counsel and the Nevada Supreme Court created a claim
25 that did not exist. The Nevada Supreme Court did deny this claim summarily on the merits. Federal
26 amended ground 2 is exhausted.

27 Respondents also unpersuasively argue that the claim of ineffective assistance in entering
28 petitioner’s plea, mentioned by the Nevada Supreme Court, is not the same claim that petitioner
presents in federal amended ground 4. State ground 3 was the equivalent to federal amended ground
4: Counsel provided ineffective assistance because he did not investigate possible defenses. State
ground 4 is a claim that counsel provided ineffective assistance because counsel gave petitioner
poor advice regarding the consequences of his guilty plea. In the post-conviction appeal brief to the

1 Nevada Supreme Court, petitioner combined both of those arguments. He argued that counsel failed
2 to ensure that petitioner was understanding the proceedings. He also argued that he wanted to
3 present a defense that he had not intended to kill Jasmine, and that there were extenuating
4 circumstances. Ex. 39, at 7-8 (#14). The Nevada Supreme Court did deny this claim summarily on
5 the merits. Federal amended ground 4 is exhausted.

6 Respondents argue that federal amended ground 3 fails to state a claim. Normally, the court
7 would defer ruling on this issue until the time is ripe to rule on the merits of all remaining claims.
8 However, petitioner's argument in opposition becomes an improper transformation of the ground.
9 The court will address the issue now in case petitioner wishes to raise his new claim properly.

10 Federal amended ground 3 is a claim that the trial court erred by failing to inform petitioner
11 about his right to a direct appeal, and thus failed to ensure that petitioner understood the guilty-plea
12 proceedings, in violation of due process and fundamental fairness guaranteed by the 5th, 6th, and
13 14th amendments. The court of appeals has held that the constitution does not require such an
14 advisement. Tanner v. McDaniel, 493 F.3d 1135, 1146-47 (9th Cir. 2007); Gairson v. Cupp, 415
15 F.2d 352, 353 (9th Cir. 1969). Petitioner argues that state law requires the judge to inform the
16 petitioner about the right to appeal, and that state law has created a liberty interest, protected by the
17 Fourteenth Amendment, that petitioner be treated the same way that similarly situated defendants
18 are treated. This is not the claim that petitioner has presented in federal amended ground 3.
19 Petitioner is presenting a new legal theory and is creating a new ground for relief. An opposition to
20 a motion to dismiss is not the proper method of raising a new ground; petitioner will need to move
21 for leave to further amend the petition if he wishes to present this new ground. See Cacoperdo v.
22 Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). Federal amended ground 3 is without merit, and
23 the court dismisses it.

24 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#21) is **GRANTED** in
25 part. Ground 3 of the first amended petition (#12) is **DISMISSED** for lack of merit.

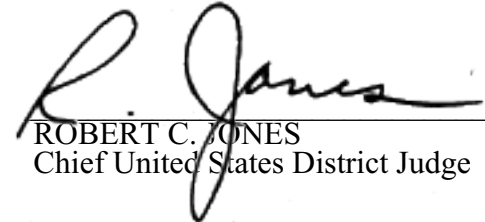
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1 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date
2 of entry of this order to file and serve an answer, which shall comply with Rule 5 of the Rules
3 Governing Section 2254 Cases in the United States District Courts. Petitioner shall have forty-five
4 (45) days from the date on which the answer is served to file a reply.

5 Dated: September 12, 2012.

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8 ROBERT C. JONES
9 Chief United States District Judge
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